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80-2170

No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in a proceeding under Section 106(a) of the Immigration and Nationality Act to review a final order of deportation, a court of appeals has jurisdiction to review the constitutionality of Section 244 (c)(2) of the Act, which establishes Congressional procedures for determining whether a particular deportation proceeding should be cancelled and the alien given permanent resident status.

2. Whether a concededly deportable alien has standing, in a Section 106(a) review proceeding, to challenge the constitutionality of Section 244(c)(2), pursuant to which the House of Representatives disapproved cancelling the deportation and granting the alien permanent resident status.

3. Whether such a review proceeding constitutes a constitutional case or controversy where (a) both the deportable alien and the Immigration and Naturalization Service, the only two parties to the proceeding, are in total agreement that Section 244(c)(2) is unconstitutional and that the deportation order should be cancelled, and (b) the deportable alien declines to seek other available relief from deportation, including the right to apply for permanent resident status following his recent marriage to an American citizen.

4. Whether the propriety of the Section 244(c)(2) procedures for Congressional adjustment of the status of deportable aliens is a "political question."

5. Whether Section 244(c)(2) of the Immigration and Nationality Act is severable from the remainder of Section 244, where any power the Attorney General may have to cancel deportation and adjust an alien's

status is conditioned upon favorable Congressional action pursuant to Section 244(c)(2).

6. Whether the Congressional procedures specified in Section 244(c)(2) constitute "necessary and proper" means of executing the plenary, sovereign power of Congress over the status and deportation of aliens, and is consistent with the letter and spirit of other provisions of the Constitution, particularly the separation of powers doctrine.

PARTIES TO PROCEEDINGS BELOW

Original parties before the United States Court of Appeals for the Ninth Circuit: (1) Jagdish Rai Chadha, a respondent herein; (2) the Immigration and Naturalization Service, a respondent herein. At all times, the Immigration and Naturalization Service has been represented by Department of Justice counsel.

Amici curiae before the Ninth Circuit, by invitation of the court: (1) the United States House of Representatives; (2) the United States Senate.

Intervening parties after judgment of the Ninth Circuit: (1) the United States House of Representatives, the petitioner herein; (2) the United States Senate, a nominal respondent herein and a separate petitioner. The Ninth Circuit granted the motions of the House and Senate to intervene on March 10, 1981. See Appendix G of jurisdictional statement in No. 80–1832, p. 75a.

Authorization to intervene on behalf of the House of Representatives was granted to the Speaker of the House by H. Res. 49, 97th Cong., 1st Sess., unanimously agreed to on January 29, 1981, 127 Cong. Rec. H 260 (Jan. 29, 1981, daily ed.). The full text of H. Res. 49 is as follows:

H. RES. 49

IN THE HOUSE OF REPRESENTATIVES, U.S.,
JANUARY 29, 1981.

Whereas, on February 27, 1978, a brief amicus curiae was submitted on behalf of the Chairman of the Committee on House Administration in the United States Court of Appeals for the Ninth Circuit in the case of Chadha v. Immigration and Naturalization Service, No. 77-1702, in support of the constitutionality of the legislative review provision in section 244(c)(2) of the Immigration and Naturalization Act, 8 U.S.C. 1254(c)(2), and on December 22, 1980, the Court of Appeals ruled that this legislative review provision violated the principle of separation of powers and was unconstitutional, and the Department of Justice, although it prevailed before the Court of Appeals, has filed a notice of appeal to the Supreme Court;

Whereas, the United States Court of Appeals for the District of Columbia Circuit is now considering the case of Consumer Energy Council of America et al v. Federal Energy Regulatory Commission, Nos. 80-2184 and 80-2312 wherein the Department of Justice has submitted a brief amicus curiae urging that the legislative review provisions of section 202 of the Natural Gas Policy Act, 15 U.S.C. 3342, are unconstitutional, and the Attorney General has suggested that the House submit a brief amicus curiae in support of these legislative review provisions;

Whereas, it is essential that the House be given an opportunity to present fully its views to the appropriate court in both of these cases, either as amicus curiae or by intervention as a party: Now, therefore, be it

Resolved, That the Speaker is authorized to retain counsel and take any steps he considers necessary, including intervention or submission of briefs amicus curiae, to protect the interests of the House before the court in the case of Chadha v. Immigration and Naturalization Service and in the case of Consumer Energy Council of America et al v. Federal Energy Regulatory Commission.

Attest:

[SEAL] EDMUND L. HENSHAW, JR.,
Clerk.

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IMMIGRATION AND NATURALIZATION SERVICE, ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The United States House of Representatives, acting through the Speaker of the House pursuant to H. Res. 49, 97th Cong., 1st Sess., respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 22, 1980, in the proceeding there captioned *Jagdish Rai Chadha* v. *Immigration and Naturalization Service,* No. 77–1702.

OPINIONS BELOW

The opinion of the Ninth Circuit, dated December 22, 1980, is reported at 634 F.2d 408. It is re-

printed in Appendix A of the jurisdictional statement filed by the Immigration and Naturalization Service in No. 80–1832, pp. 1a–63a. The unreported administrative decisions are also reported in the appendices to that jurisdictional statement; the two decisions of the INS immigration judge appear in Appendix B, pp. 64a–66a, and in Appendix D, pp. 70a–71a, while the opinion of the Board of Immigration Appeals appears in Appendix E, p. 72a–73a.

JURISDICTION

The judgment of the Ninth Circuit was entered on December 22, 1980, more than two and one-half years subsequent to the oral argument on April 10, 1978. That judgment is reprinted in the Senate's petition for certiorari, Appendix K, p. 84a.

On February 3, the Speaker of the House of Representatives and the Senate filed motions to intervene in order to file, *inter alia,* a petition for rehearing with a suggestion for rehearing *en banc* (the Ninth Circuit having extended the time for filing such a petition). On March 10, 1981, the Ninth Circuit granted the motions to intervene and ordered that the timely filed petition for rehearing *en banc* be circulated to the active judges of the court. J.S.App.G, p. 75a. On March 25, 1981, the Ninth Circuit denied the petition for rehearing filed by the Speaker of the House and the Senate, and rejected the suggestion for a rehearing *en banc.* J.S.App.H, p. 76a. This petition was filed within 90 days of the denial of rehearing. On April 8, 1981, on an unopposed motion of the Speaker and the Senate, the Ninth Circuit stayed its mandate pending the filing of petitions for certiorari on or before June 23, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In the Appendix hereto, p. 27, *infra,* are contained the various constitutional and statutory provisions that the petitioner deems pertinent to this case. Those provisions are:

1. Article I, Section 1, of the Constitution.
2. Article I, Section 7, Clauses 2 and 3, of the Constitution.
3. Portions of Article I, Section 8, of the Constitution.
4. Article II, Section 1, of the Constitution.
5. A portion of Article II, Section 3, of the Constitution.
6. Section 244(c) (1) and (2) of the Immigration and Nationality Act of 1952.
7. A portion of Section 106(a) of that Act.

STATEMENT

A. EVENTS LEADING TO FINAL DEPORTATION ORDER

1. The respondent Chadha is a native of Kenya, and is now a citizen and subject of Great Britain. He was originally admitted to the United States in 1966 as a nonimmigrant student, under Section 101(a)(15)(J) of the Immigration and Nationality Act of 1952, for a temporary period only. After being extended, that period finally expired on June 30, 1972. App. 44.[1]

2. Having overstayed the authorized time limit, Chadha became subject to deportation in accordance

[1] Citations herein to "App. ——" refer to the printed Appendix before the Ninth Circuit; that Appendix contains the entire record of the INS administrative proceedings leading to the final order of deportation. Citations herein to "J.S. App. ——" are to the various appendices in the INS jurisdictional statement before this Court in No. 80-1832.

with Section 241(a)(2) of the Act.[2] The Immigration and Naturalization Service (hereinafter "INS") accordingly issued an order to show cause why he should not be deported under that section. A hearing on the order to show cause was held before an INS immigration judge in January of 1974. At that hearing, Chadha's counsel conceded "that he is deportable as charged." App. 19–20. In accord with that concession, the INS immigration judge concluded in his June 25, 1974, decision that Chadha "is deportable as charged" in the show cause order. App. 8, 13; J.S. App. B, p. 65a, J.S. App. D, p. 70a. Chadha has never retracted that concession, and his deportability was in effect reaffirmed in the final deportation order issued by the INS immigration judge in 1976. The Board of Immigration Appeals also acknowledged Chadha's deportability when it dismissed his appeal from the final deportation order in February of 1977. App. 1–2; J.S. App. E, pp. 72a–73a.

3. But the 1974 proceedings did not lead immediately to the entry of a final order of deportation. Immediately upon the oral concession of deportability during that 1974 hearing, Chadha's counsel made an oral application for "suspension of deportation" pursuant to Section 244(a)(1) of the Act. See App. 20. The show cause hearing was then adjourned so that a written application for suspension of deportation could be prepared and submitted. See App. 44–47.

4. The respondent Chadha was able to invoke the Section 244 suspension procedure only because he was in fact deportable under Section 241(a)(2). As Section 244(a)(1) provides, an alien may apply for sus-

[2] Section 241(a)(2) directs the Attorney General to deport any alien "who is in the United States in violation of this chapter." Having overstayed the statutory time limit, Chadha was "in the United States" in violation of the Act.

pension of deportation only if *inter alia*, he "is deportable under any law of the United States." On that basis, Chadha was eligible to apply for suspension. Under Section 244(a)(1), the alien must also have been physically present in the United States for seven continuous years immediately preceding the application, and prove that he was of good moral character during all that period. Most importantly, he must be "a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."

5. As evidenced in this case, the Attorney General has delegated most of his discretionary authority under Section 244(a)(1) to INS immigration judges. See J.S., p. 4, n. 2. But it is noteworthy that the decision of an INS immigration judge is not final. If the suspension application is denied, the decision is ultimately reviewable in the courts. On the other hand, a favorable decision merely "suspends" the deportation pending completion of the Congressional phase of the Section 244 procedures.

6. It should also be noted at this point that the only statutory authority for cancelling deportation, following a grant of suspension of deportation by an INS immigration judge, is after the exhaustion of the Congressional procedures specified in Section 244(c)(2). The last sentence of that section provides that if "neither the Senate nor the House of Representatives shall pass such a resolution [disapproving any change in the alien's deportable status], the Attorney General shall cancel deportation proceedings." When such cancellation is authorized, Section 244(d) further directs the Attorney General to "record the alien's lawful admission for permanent residence as of the

date the cancellation of deportation of such alien is made.

7. At the subsequent suspension hearing on February 7, 1974, Chadha rested his "extreme hardship" claim mainly on his own statements that neither Kenya nor Great Britain "want me or people of my ethnic background," that "I do not want to subject myself to any economic, racial or political hostilities," that he had resided in the United States for seven years and considered it to be "my home," that he was "well adjusted to the entire American philosophy of living," and that "most important I am engaged to an American citizen . . . and we contemplate getting married sometime in the future."[3] Evidence was also submitted that indicated he would need work permits or employment vouchers to be able to work in either Kenya or the United Kingdom, which might take some time to obtain. At the end of Chadha's testimony, the following colloquy took place (App. 37–39):

> The IMMIGRATION JUDGE. Do you intend to get married in the near future?
>
> RESPONDENT. It's not—well I cannot pinpoint the time but we eventually would get married.

---

[3] Late in November of 1980, respondent Chadha filed a memorandum in the Ninth Circuit stating that on August 10, 1980, he had married a citizen of the United States, although not the one to whom he had been engaged in 1974. He recognized that he was eligible to have an immediate relative visa petition filed by his wife and to apply for adjustment of his status to permanent resident alien. See 9 CFR 204.1; 8 U.S.C. § 1151(b). But he proclaimed that "there is no present intention" to seek such an adjustment. Before the INS or Congressional *amici* had a chance to comment on this development, the Ninth Circuit issued its option on December 22, 1980. In footnote 6 of that opinion, J.S.App.A, p. 17a, the Ninth Circuit stated that the marriage and the eligibility for change in status did not make the case moot.

The IMMIGRATION JUDGE. The reason I ask this is because your case is not a particularly good one for suspension of deportation. However, if you got married you would have no difficulty in having your status adjusted. Anything else, Mr. Mittleman?

Mr. MITTLEMAN [Chadha's counsel]. No, your Honor.

* * * * *

The IMMIGRATION JUDGE. Mr. Mittleman, I'm unable to find on the basis of the evidence submitted that Mr. Chadha would suffer the extreme hardship required by the statute. Accordingly, I am going to deny his application for suspension of deportation. Now as an alternative you have asked for asylum on his behalf.

Mr. MITTLEMAN. Yes, your Honor.

The IMMIGRATION JUDGE. All right. I won't render my decision now. I'm going to adjourn the case so that you may proceed with your application for asylum. You will hear from the Immigration and Naturalization Service in connection with that application.

* * * * *

The hearing is adjourned.

The hearing is resumed.

The IMMIGRATION JUDGE. Mr. Mittleman, on further thought I think I might be inclined to grant this application for suspension of deportation. Accordingly, I am going to ask you to withdraw for the present your request for asylum in behalf of the respondent. Do you agree?

Mr. MITTLEMAN. I withdraw it. Yes, I do.

* * * * *

The hearing is closed.

8. On June 25, 1974, the INS immigration judge issued his formal decision granting Chadha's application for suspension of deportation. J.S. App. B, pp. 64a–66a. Without explaining his sudden change of mind at the February hearing, the judge wrote:

> The respondent [Chadha] has established that it would be extremely difficult, if not impossible, for him to return to Kenya or go to Great Britain by reason of his racial derivation. He has stated that his deportation would result in a hardship to him because he has formed strong personal ties with friends and because it is questionable whether he would be able to utilize his education in other countries.
>
> Because of his race and the difficulties he would face by reason thereof, I am satisfied that his deportation would result in an extreme hardship to him. I am also of the opinion that because of this circumstance, his application for suspension of deportation should be granted as a matter of administrative discretion.

9. But, in accordance with the above-described statutory scheme, the INS immigration judge's decision of June 25, 1974, did not order that the deportation proceedings be cancelled. Rather, the decision recognized that the suspension order was conditional and that cancellation would depend upon what action Congress took pursuant to Section 244(c)(2). Thus, the judge ordered (J.S.App.B, at p. 66a):

> *It is ordered,* That the deportation of the respondent be suspended under the provisions of Section 244(a)(1) of the Immigration and Nationality Act, as amended.
>
> *It is further ordered,* That if Congress takes no action adverse to the order granting suspension

of deportation, the proceedings be cancelled and that appropriate action be taken pursuant to Section 244(d) of the Immigration and Nationality Act, as amended.

It is further ordered, That in the event Congress takes action adverse to the order granting suspension of deportation these proceedings shall be reopened upon notice to the respondent.

10. A full report on Chadha's case was made to the Congress by the INS, acting on delegated authority from the Attorney General. This was done in compliance with Section 244(c)(1), which provides that if the deportation of any alien is suspended—as in Chadha's case—"a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension."

11. Congress thereafter considered Chadha's case in accordance with the procedures set forth in Section 244(c)(2). On the House side, the Judiciary Subcommittee on Immigration, Citizenship, and International Law made a full inquiry into the record before the INS with respect to Chadha's eligibility for suspension, as well as his eligibility for the ultimate relief of cancellation of deportation and a change in status to that of a permanent resident alien. Available in this review was the transcript of the suspension hearing in which the INS immigration judge had made so sudden and inexplicable a reversal of his evaluation of Chadha's eligibility for suspension. The Subcommittee determined that Chadha should not be granted relief from deportation by way of granting him permanent residence status. The full Judiciary Committee, after due consideration, accepted the Subcommittee's con-

clusion. H. Res. 926 was thereupon prepared for submission to the House.

12. On December 16, 1975, the House unanimously adopted H. Res. 926. 121 Cong. Rec. 40800; J.S.App C, pp. 67a–69a. The resolution itself stated that "the House of Representatives does not approve the granting of permanent residence in the United States to the [six] aliens hereinafter named [including Chadha], in which cases the Attorney General has submitted reports to the Congress pursuant to section 244(a)(1) of the Immigration and Nationality Act, as amended." Rep. Eilberg, Chairman of the Subcommittee on Immigration, explained that it was the Committee's feeling that Chadha and the other named aliens did not meet the statutory requirements necessary for relief from deportation, "particularly as it relates to hardship." Such action by the House was in strict conformity with Section 244(c)(2), the procedural provision found unconstitutional by the Ninth Circuit.

13. In light of the House adoption of the disapproval resolution and in accordance with the terms of the INS order suspending Chadha's deportation, the INS reopened the suspended deportation proceedings. Where one House has taken such action, Section 244 (c)(2) directs that "the Attorney General shall thereupon deport such alien." And so at the reopened hearing before the INS immigration judge on August 4, 1976, Chadha was given one last chance to show why he should not be deported in accordance with Section 241(a)(2), as originally charged. That he could not do. The immigration judge accordingly entered a final and uncontested order that Chadha be deported to the United Kingdom "on the charge set forth in the Order to Show Cause." App. 6–7; J.S. App. D, pp. 70a–71a.

This order was a part of the judge's decision dated November 8, 1976.

14. While making no claim at the reopened hearing that he was not deportable as charged, Chadha did move to terminate the deportation proceeding "on the grounds that Section 244(c)(2) of the Immigration and Nationality Act is unconstitutional in that it's violative of the separation of powers doctrine." App. 9. The judge's decision of November 8, 1976, rejected that contention on the ground that the judge had no authority to pass on the constitutionality of Acts of Congress. App. 6–7; J.S. App. D, pp. 70a–71a.

15. Chadha renewed his attack on the validity of Section 244(c)(2) on his appeal to the Board of Immigration Appeals from the final order of deportation. The Board dismissed the appeal and affirmed the final deportation order. In so doing, the Board found Chadha's constitutional contentions respecting Section 244(c)(2) to be "without merit." App. 1–2; J.S. App. E, pp. 72a–73a.

B. JUDICIAL REVIEW OF THE FINAL DEPORTATION ORDER

16. On March 24, 1977, the appellee Chadha filed in the Ninth Circuit a petition for review of the final deportation order pursuant to Section 106(a) of the Act, 8 U.S.C. § 1105a(a), which permits judicial review of such orders. Chadha's petition in no way questioned the statutory or constitutional propriety of the final deportation order. Nor was any complaint made that he had proved "extreme hardship" and that the House had acted arbitrarily in denying him relief on that basis. The sole contention was that the Section 244(c)(2) procedure, whereby either House can disapprove a change in the deport-

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able status of an alien, exceeded the legislative powers of Congress and invaded functions vested by the Constitution exclusively in the Executive Branch. Chadha's brief on the merits was devoted solely to developing those constitutional contentions.[4] The brief made no reference to any personal rights of Chadha being at stake.

17. So single-minded was Chadha's claim that the Section 244(c)(2) procedure invaded the President's constitutional functions that his brief neglected to request that the order of deportation be set aside, a deficiency that was soon rectified by the INS brief on the merits. Chadha's brief concluded with a peroration that the Ninth Circuit should prevent an undoing of "the whole fabric of the Constitution . . . by declaring the one-House veto provision of Section 244 (c)(2) repugnant to the Constitution." Brief, p. 61.

18. The INS responded in the Ninth Circuit with a brief in total agreement with Chadha's constitutional contentions, while adding a few refinements thereto.[5] The brief commenced with the statement that the INS, as respondent, "agrees with petitioner that Sec-

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[4] Chadha made four points in his brief on the merits: (1) neither the power to regulate naturalization nor the Necessary and Proper Clause empowers Congress to act in contravention of other constitutional provisions; (2) the "Congressional veto" violates the separation of powers doctrine; (3) the "Congressional veto" deprives the President of the opportunity to exercise his veto power under Article I, Section 7; and (4) the "one-House veto" provision violates the requirement of a bicameral Legislature.

[5] The INS brief on the merits made three points: (1) Section 244(c)(2) violates the Article I procedures for enactment of the laws of the United States; (2) Section 244(c)(2) is an intrusion into executive and judicial powers and functions, in violation of the separation of powers doctrine; and (3) Section 244(c)(2) is severable from other provisions of the Act.

tion 244(c)(2) of the Immigration and Nationality Act is unconstitutional." Brief, p. 7. It concluded with the request that "this Court should set aside the [INS] order for petitioner's deportation." Brief, p. 36.[6] That was the same deportation order, incidentally, that Chadha has consistently acknowledged is proper under the unchallenged provisions of Section 241(a)(2).

19. Since it was evident that Chadha and the INS were in complete agreement as to the only matter in issue (the constitutionality of Section 244(c)(2)), as well as to the relief sought, the Ninth Circuit invited the House of Representatives and the Senate to appear as *amici* to defend the constitutionality of the Section 244(c)(2) procedures. The invitations were accepted, although with no intent to supply any adverseness that might be deemed necessary as between the parties to this case.

20. The Congressional *amici* proceeded to participate in the briefing and oral arguments before the Ninth Circuit. In addition to arguing in defense of the constitutionality of Section 244(c)(2), the *amici* urged various prudential, procedural and jurisdictional reasons why the difficult constitutional issues should not and need not be reached. The Ninth Circuit rejected all such threshold contentions. And in this Court, the INS jurisdictional statement in No. 80–1832, at pp. 6–7, n. 6, expresses total satisfaction with the Ninth Circuit's disposition of the threshold matters. In so doing, the INS has differed not one whit from Chadha's position on these matters.

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[6] In its reply to the briefs of Congressional *amici*, the INS reiterated that "Section 244(c)(2) is unconstitutional," and therefore "this Court should set aside the [INS] order for petitioner's deportation." Reply Brief, at 13, 18.

21. The Ninth Circuit's decision, more than two and a half years in the making, systematically rejected all arguments advanced by the Congressional *amici*. In summary, the court held:

(a) The court ruled it had jurisdiction to determine the validity of Section 244(c)(2) in the context of a Section 106(a) proceeding, which authorizes judicial review of "all final orders of deportation . . . made against aliens . . . pursuant to administrative proceedings under section 242(b)."[7] The term "final orders" was construed to include all matters on which the validity of a final order is contingent. Thus since the validity of Chadha's final order was contingent upon the validity of the House disapproval resolution under Section 244(c)(2), the constitutionality of that section could be attacked in this review of the final deportation order. J.S.App.A, pp. 4a–11a.

(b) Chadha was held to have standing to protest the validity of Section 244(c)(2) since he can directly trace his injury in fact—i.e., deportation—to the operation of Section 244(c)(2). The court said that if Section 244(c)(2) were invalidated, the original suspension under Section 244 (a) would be reinstated and Chadha's status adjustment would become permanent. Thus, concluded the court, Chadha has made out an Article III case or controversy. J.S.App.A, pp. 12a–20a.

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[7] One day after the oral argument on April 10, 1978, the Ninth Circuit requested that the parties and the *amici* file supplemental briefs addressed to two questions: (1) whether the order appealed from was a final order within the meaning of Section 106(a), and (2) whether any judicial forum has jurisdiction to resolve Chadha's constitutional questions, assuming the court lacks jurisdiction under Section 106(a). Again, the INS and Chadha displayed no differences in answering those questions.

(e) Section 244(c)(2) is functionally independent and severable from the rest of Section 244. J.S.App.A, pp. 13a–16a.

(d) Chadha's claim that Section 244(c)(2) violates the separation of powers doctrine was held not to present a nonjusticiable political question. The separation of powers doctrine was held not to be textually committed to any one branch. And, said the court, since Chadha suffers injury due to the operation of a statute he claims violates the separation of powers doctrine, this type of claim is subject to judicially manageable standards. J.S.App.A, pp. 20a–22a.

(e) Chadha's claim was held to have the necessary adverseness, despite the fact that the INS has agreed that Section 244(c)(2) is unconstitutional. "Here Chadha has asserted a concrete controversy, and our decision will have real meaning; if we rule for Chadha, he will not be deported; if we uphold section 244(c)(2), the INS will execute its order and deport him." J.S.App.A, pp. 22a–23a. Moreover, the court added, courts often adjudicate cases in which legal or factual matters are conceded.

(f) The court held, in a footnote, that the fact that Chadha had recently married an American citizen did not make the case moot. Not even the fact that he could obtain relief through an immediate relative petition would relieve Chadha of significant collateral detriment, i.e., he would have to wait longer in order to be eligible for citizenship status, since he could not gain permanent resident status until and unless that immediate relative petition had been granted. The court then proceeded to grant Chadha certain relief he had not requested; it determined that Chadha's status

as a legal resident "will have commenced when he received the initial grant of administrative suspension [on June 25, 1974]." J.S.App.A., pp. 17a–18a, n. 6.

(g) On the constitutional merits, the court held that the Section 244(c)(2) mechanism violates the constitutional doctrine of separation of powers, since it is a prohibited legislative intrusion upon the Executive and Judicial Branches. Congress, in short, has interfered with an essential Executive function of enforcing the Immigration and Nationality Act on a case-by-case basis. And Congress, by assuming the task of correcting misapplications of the law and thereby rendering ineffective all judicial interpretations, has interfered with the basic Judicial function. J.S.App.A, pp. 24a–63a.

(h) Finally, the court ordered the following relief (J.S. App. A, p. 63a):

> The decision by the Attorney General to stay deportation is deemed final. The deportation proceedings are deemed cancelled within the meaning of section 244(d) of the Immigration and Nationality Act, and the Attorney General is ordered to cease and desist from taking any steps to deport this alien based upon the resolution enacted by the House of Representatives. It is so ordered.

The court's accompanying judgment, however, provided simply that "it is now here ordered and adjudged by this Court, that the deportation proceedings of the I&NS in this Cause be, and hereby is cancelled." See Senate petition for certiorari, Appendix K, p. 84a.

As the Solicitor General has told this Court in No. 80–1832, the Ninth Circuit's decision "presents constitutional issues of the most fundamental nature regarding the distribution of powers among the branches of the federal government and the manner in which those powers may be exercised." J.S. at 11.

But the answers given by the Ninth Circuit do not comport with the high calling of these issues. The answers will have an unsettling effect not only on the administration of the Immigration and Nationality Act but also on the future course of relationships between the Legislative and Executive Branches. The decision below does indeed signal a profound shift in what the Solicitor General terms "the distribution of powers among the branches of the federal government." In a nutshell, the court has conferred upon the Executive, at the expense of the Legislature, virtually unlimited power to determine how the laws of the United States shall be executed and implemented.

Consider what the decision below means in terms of implementing the Immigration and Nationality Act. Historically, as the Senate's petition for certiorari points out, the Congress has refused to assign the Attorney General the function of finally determining which illegal or deportable aliens should be allowed to remain permanently in the United States. Section 244(c)(2) was carefully structured to retain that sovereign function in the Congress, which has acted upon recommendations from the Attorney General in the form of "suspensions" of deportation.

But, under the Ninth Circuit's ruling, the Congress is constitutionally proscribed from calling upon the Attorney General in this manner to aid in the execution

of Congress's great power over aliens. The Attorney General must now be given, as a constitutional proposition, total power to implement all aspects of Section 244 suspension applications; he alone is to have power to cancel deportation and alter the status of the deportable alien. The Executive's power of implementation has been deemed supreme. Congress cannot participate in the execution of its own inherent power over deportation. Not even the courts will have occasion to review any abuses in the grant of relief by the Attorney General, for who will be aggrieved?

Section 244(c)(2) has long been an example of "the inherent necessities of the governmental co-ordination," *Hampton & Co.* v. *United States*, 276 U.S. 394, 406 (1928), that has marked modern federal government. Congress has frequently found it wise to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation. And Congress has frequently found it appropriate, particularly in areas of its own sovereign legislative powers, to supervise and to oversee and in some cases to finalize the coordinated Executive functions.

But the Ninth Circuit's separation philosophy would ban such experiments in inter-Branch coordination. The Congress would largely be confined to its Article I, Section 7, task of enacting new laws. The Executive, having been assigned the task of faithfully executing the laws, would be given wide-ranging authority to execute Congressional statutes without legislative restraint or oversight. In the Ninth Circuit's world of separate governmental functions, there would be that which this Court warned against in *Buckley* v. *Valeo*, 424 U.S. 1, 121 (1976), that "hermetic sealing off of the three branches of Government from one another [which] would preclude the estab-

lishment of a Nation capable of governing itself effectively."

Underlying this unwholesome view of the separation of powers doctrine is a misapprehension of the role of Congress in executing and dividing the various powers of government not specifically vested by the Constitution in one Branch only. Apart from a few specific and implied executive and judicial powers, it is the Congress—operating under the Necessary and Proper Clause—that determines not only how its own vested powers shall be executed but how and under what conditions the Executive and Judicial Branches shall execute theirs. That is basically how the Necessary and Proper Clause operates in its horizontal aspect, i.e., the part of the Clause giving Congress the power to make laws necessary and proper to carry into execution all other powers vested in the Government, or any department or officer thereof.[8] That is one of the analytical heritages of John Marshall's ruling in *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 159, 206 (1819).

The Ninth Circuit effectively disregarded both the vertical and the horizontal effects of this Clause in assessing the validity of Section 244(c)(2). It refused to analyze or discuss the "necessary and proper" underpinning of Section 244(c)(2) in the light of a generalized separation of powers assault. That analytical failure not only devalued the separation doctrine but brought its decision into direct conflict with the "necessary and proper" approach of the Court of Claims in *Atkins* v. *United States,* 556 F.2d 1028, 1057–71 (Ct. Cls. 1977), *cert. denied,* 434 U.S. 1009 (1978). See also *Pressler* v. *Simon,* 428 F.Supp. 302

[8] See Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause,"* 36 Ohio State L. J. 788 (1975).

(D.D.C. 3-judge court, 1976), *aff'd sub nom. Pressler* v. *Blumenthal*, 434 U.S. 1028 (1978).

Atkins held constitutional the so-called "one-House veto" provision of the Salary Act, under which either House could disapprove a Presidential recommendation that judicial salaries be increased. In so ruling, *Atkins* rejected precisely the same kind of generalized separation of powers argument that is advanced in the instant case. The *Atkins* court observed, and we believe correctly, that Congress in the Salary Act was exercising both the vertical and the horizontal aspects of its "necessary and proper" power: (1) vertically, it was exercising its vested function to fix judicial salaries; (2) horizontally, in the court's words, "Whatever power the President exercises under the Salary Act, comes not from article II but from the delegation of Congress pursuant to the necessary and proper clause." 556 F.2d at 1069. The court thus disassembled the separation of powers doctrine argument in these terms (556 F.2d at 1068):

> Unless Congress invades a power specifically granted to the President in the Constitution, such as the power of appointment, or fails to provide guidelines, no separation-of-powers problem arises from such a delegation. Moreover, when Congress delegates authority of the kind we have here to a member of the executive branch, the delegation does not convert the authority granted into an irrevocable executive power, because in exercising the delegated functions, the executive officer merely acts as an agent of the legislative branch of the Government. . . . it may be observed that legislation is itself a form of supervision. Congress has two roles: initial formulation of policy and supervision. The only pertinent question is in

> what manner Congress can oversee. In this case, whether the answer is by full-fledged statute or by one-House veto, there would be neither a violation of the separation-of-powers principle nor an invalid intrusion on executive power since the pay-setting function is basically legislative in character and embodies no substantial element of, or incursion into, the administration, enforcement, or execution of the laws.

The House of Representatives respectfully suggests that the Ninth Circuit's analysis of Section 244(c)(2) is diametrically opposed to the Court of Claims' "necessary and proper" analysis of the Salary Act provision. Had the Ninth Circuit followed the *Atkins* approach, which was grounded in *McCulloch* v. *Maryland*, it would have recognized that: (1) in enacting Section 244(c)(2), Congress was providing a necessary and proper means for exercising its vested sovereign power over aliens and deportation, that is, it was utilizing the vertical aspect of the Clause; (2) in providing that the Attorney General shall perform certain "suspension" functions under Section 244, Congress was delegating those functions to him pursuant to the horizontal sweep of the Clause. Those functions, in other words, came not from Article II executive power but from a "necessary and proper" delegation. If that is so, the separation of powers criticism of Section 244(c)(2) evaporates. And the same analysis disposes of any claimed invasion of judicial functions.

The House is well aware of the reluctance of this Court to decide great issues of constitutional law, particularly those that affect the very structure of the federal government, unless the necessities of litigation so dictate. The House accordingly directs the Court's attention to several matters of a threshold nature that were resolved by the Ninth Circuit, any

one of which might be sufficient to dispose of this case without reaching the constitutional issues. Since neither of the original parties to the litigation seems disposed to advance these matters before the Court, they are set forth here rather summarily. Both the House and the Senate are prepared to discuss these matters more thoroughly upon fuller review of the decision below.

(1) Did the Ninth Circuit have jurisdiction to resolve the constitutionality of Section 244(c)(2) in the context of a Section 106(a) review of a final order of deportation made "pursuant to administrative proceedings"? The Ninth Circuit's theory was that a final order includes all matters on which its validity is dependent. But that seems questionable. The respondent Chadha at all times has conceded that the deportation order was valid under Section 241(a)(2). Section 244(c)(2) deals not with the validity of deportation orders but with entirely different petitions for discretionary relief from deportation orders. The difficulty with invoking Section 106(a) to review the constitutionality of Section 244 (c)(2) is that the court of appeals is confined to the administrative record regarding deportation and suspension; there is no opportunity to develop a constitutional fact record concerning the use and justification of the legislative review technique.

(2) Did Chadha have standing to protest the validity of Section 244(c)(2)? The Ninth Circuit found standing on the dubious theory that Chadha's injury, his threatened deportation, was traceable to the operation of Section 244(c)(2). But that is an tenable as saying that the obligation to serve a valid prison sentence is traceable to the operation of a pardon statute, under which a pardon was refused the prisoner. Moreover, there appears to be no nexus

here between the claimed injury and the claimed illegal act of the House of Representatives in disapproving a change in Chadha's deportable status. Nor is there any apparent nexus between Chadha's deportable status and the constitutional separation of powers doctrine upon which he relies so exclusively. Cf. *Flast* v. *Cohen*, 392 U.S. 83 (1942).

(3) Does the fact that both parties agreed and argued that Section 244(c)(2) is unconstitutional drain the proceeding of an essential case or controversy requirement, that of adverseness? The motion of the House of Representatives to dismiss the appeal of the Immigration and Naturalization Service in No. 80–1832 discusses in detail why the Ninth Circuit's negative answer to that question seems in error. Suffice it here to say that the court failed to address or distinguish this Court's holding in *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47, 47–48 (1971), that where both litigants desire precisely the same result on a constitutional issue there is "no case or controversy within the meaning of Art. III of the Constitution."

(4) Does this proceeding become moot when the deportable alien becomes eligible, as by marriage to an American citizen, to seek another avenue of relief from the threatened deportation, but knowingly declines to take that route? This appears to be a novel point in the law of mootness, there being no direct precedent. It deserves further exploration.

(5) Does the claim that Section 244(c)(2) violates the separation of powers doctrine implicate the "political question" doctrine? The Ninth Circuit said "no" inasmuch as the separation of powers doctrine is not textually committed to any one branch. But the problem is not that simple. Here a very general separation of powers doctrine is being applied in the con-

text of an exercise by Congress of its vast powers under the Necessary and Proper Clause. What may be "necessary" or "proper" for purposes of executing those powers would seem to be matters textually committed exclusively to the Congress, as John Marshall said so long ago, at least where the alleged separation violation is not directed to some function specifically delegated by the Constitution to the President. Cf. *Buckley* v. *Valeo*, 424 U.S. at 135, where the specific appointment powers of the President were implicated.

(6) Is Section 244(c)(2) so severable from the remainder of Section 244 that a ruling that Section 244 (c)(2) is invalid would leave the remainder still effective, or is it evident that Congress would not have enacted Section 244 without the provisions of Section 244(c)(2)? The House suggests that the Ninth Circuit, in holding Section 244(c)(2) severable, simply misread the long legislative background of this important provision. The House also suggests that the Ninth Circuit, in purporting to find some authority outside Section 244(c) (2) for cancelling deportation and altering the status of a deportable alien, misread the plain words of Section 244(c)(2) and the other provisions of Section 244. The result appears to be an emasculation of Section 244, contrary to the long standing intent of Congress. And most distressing of all, this result seems to have been achieved through a series of judicial decrees and "deemings"—which reach their peak in the last paragraph of the Ninth Circuit's opinion. See J.S.App.A, p. 63a, and p. 16, *supra*.

CONCLUSION

For the first time in the history of the American government, the Congress of the United States has been forced to intervene in judicial proceedings in order to protest before this Court an assault upon its

legislative prerogatives by another branch of government. This is not a happy occasion. Neither the House nor the Senate is a litigating body. But they have no alternative when first the Executive Branch and now the Judicial Branch have mounted a serious offensive against the exercise by Congress of its vested powers under the Necessary and Proper Clause.

Both the House and the Senate are confident that this Court will take appropriate steps to preserve and protect our tripartite form of government.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 1, of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

2. Article I, Section 7, Clauses 2 and 3, of the United States Constitution provide in pertinent parts:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. . . .
>
> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

3. Article I, Section 8, of the United States Constitution provides in pertinent parts:

The Congress shall have Power * * *

* * * * *

To establish a uniform Rule of Naturalization, * * *

* * * * *

—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

4. Article II, Section 1, of the United States Constitution provides in pertinent part:

The executive Power shall be vested in a President of the United States of America.

5. Article II, Section 3, of the United States Constitution provides in pertinent part:

* * * he shall take Care that the Laws be faithfully executed, * * *

6. Section 244(c)(1) and (2) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1254(c)(1) and (2), provide:

(c) Fulfillment of requirements of subsection (a); report to Congress

(1) Upon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of the law shall be reported to the Congress with the reasons for

such suspension. Such reports shall be submitted on the first day of each calendar month in which Congress is in session.

(2) In the case of a alien specified in paragraph (1) of subsection (a) of this section—

if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

7. Section 106(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1105a(a), provides in pertinent part:

The procedure prescribed by, and all the provisions of sections 1031 to 1042 of Title 5, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252 (b) of this title or comparable provisions of any prior Act, * * *

8. Other pertinent provisions of Section 244 and other sections of the Immigration and Nationality Act of 1952 are set forth in Appendix J of the INS jurisdictional statement filed in No. 80–1832, pp. 79a–83a, and in Appendix L of the Senate's petition for certiorari in this case.